

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

9 JOSEPH VERNON GRUBBS,

10 Defendant.

CR16-228 TSZ

ORDER

11 THIS MATTER comes before the Court on defendant Joseph Vernon Grubbs's  
12 motion for compassionate release, docket no. 92. Having reviewed all papers filed in  
13 support of, and in opposition to, the motion, the Court enters the following order.

14 **Background**

15 Defendant pleaded guilty to receipt of child pornography and was sentenced on  
16 October 5, 2017, to nine years (108 months) in the custody of the United States Bureau of  
17 Prisons ("BOP"). *See* Judgment (docket no. 70). Defendant was remanded at the time of  
18 sentencing and is currently incarcerated at Federal Correctional Institution ("FCI")  
19 Terminal Island in California, with a projected release date of April 15, 2025. He seeks  
20 immediate release on the ground that his age (72) and medical conditions (hypertension,  
21 class 2 obesity, type 2 diabetes, asthma, gout, a cardiac arrhythmia, and the lingering  
22 effects of Coronavirus Disease 2019 ("COVID-19")) increase the possibility of acute  
23

1 illness or death from COVID-19, which warrants a reduction in his sentence. The Court  
2 agrees.

### 3 Discussion

4 A sentence is generally considered final and may not be altered except in limited  
5 circumstances. *See* 18 U.S.C. § 3582(b); *see also* *Dillon v. United States*, 560 U.S. 817,  
6 824 (2010). Prior to 2018, a modification for reasons other than a post-conviction  
7 lowering of the applicable sentencing range could be made only upon a motion brought  
8 by the Director of BOP. *See United States v. Rodriguez*, --- F. Supp. 3d ---, 2020 WL  
9 1627331 at \*2 (E.D. Penn. Apr. 1, 2020). Congress has since enacted the First Step Act  
10 of 2018, which permits a defendant, after exhausting administrative remedies,<sup>1</sup> to directly  
11 request a reduction in the term of incarceration. *See* 18 U.S.C. § 3582(c)(1)(A). The  
12 First Step Act did not, however, amend the two statutorily-enumerated grounds for  
13 compassionate release, namely (i) the existence of “extraordinary and compelling  
14 reasons” supporting a reduction; or (ii) the satisfaction of certain criteria for a defendant  
15 sentenced to life imprisonment under 18 U.S.C. § 3559(c). *See id.* at § 3582(c)(1)(A)(i)  
16 & (ii). The second basis for relief does not apply in this case, and thus, defendant Joseph  
17 Vernon Grubbs bears the burden of establishing that “extraordinary and compelling  
18 reasons” justify a decrease in the term of his imprisonment. *See Riley v. United States*,

---

19  
20  
21 <sup>1</sup> The exhaustion requirement is satisfied on the earlier of (i) the resolution of an administrative  
22 appeal concerning BOP’s failure to bring a motion for early release on a defendant’s behalf, or  
23 (ii) the lapse of thirty (30) days after the warden of the facility at which the defendant is in  
custody receives a request to make such motion. 18 U.S.C. § 3582(c)(1)(A). The parties agree  
that defendant in this matter has met the prerequisite of exhaustion.

2020 WL 1819838 at \*7 (W.D. Wash. Apr. 10, 2020). Any compassionate release must also be consistent with (i) the sentencing factors set forth in 18 U.S.C. § 3553(a), and (ii) the applicable policy statement issued by the United States Sentencing Commission (“Commission”). See 18 U.S.C. § 3582(c)(1)(A).

**A. Extraordinary and Compelling Reasons**

The Government has conceded that defendant’s age and medical conditions, which increase his risk of fatality from COVID-19, constitute “extraordinary and compelling reasons” for a sentence reduction. See Supp. Filing (docket no. 103). The Court accepts the Government’s concession as being consistent with defendant’s well-documented, serious medical conditions, see BOP medical records, Ex. A to Def.’s Mot. (docket no. 94), which render him extremely vulnerable to the coronavirus that causes COVID-19. The Government’s position is also in harmony with the following factors, which have been considered by one or more courts in deciding motions for compassionate release in the context of COVID-19: (i) whether the inmate is at higher risk because of his or her age and/or race, see United States v. Young, 2020 WL 2614745 at \*3 (W.D. Wash. May 22, 2020); (ii) whether the inmate has one or more, medically-documented, chronic health conditions that render him or her more vulnerable to COVID-19, see United States v. Locke, 2020 WL 3101016 at \*4 (W.D. Wash. June 11, 2020) (observing that the movant’s health issues were “not merely self-diagnosed,” but rather “medically documented and verified”); Rodriguez, 2020 WL 1627331 at \*7 (inmate with type 2 diabetes, obesity, hypertension, and liver abnormalities was in a “higher risk category”); (iii) the fatality rate for individuals with similar health conditions as compared with the

overall fatality rate for COVID-19, *see Rodriguez*, 2020 WL 1627331 at \*7 (summarizing COVID-19 fatality rates); *United States v. Pippin*, 2020 WL 2602140 at \*1 (W.D. Wash. May 20, 2020) (granting a motion brought by a defendant suffering from pancytopenia, which is associated with an “over fivefold enhanced risk of severe COVID-19”); (iv) whether the inmate has previously tested positive for the coronavirus that causes COVID-19 and, if so, whether the inmate suffers from any long-term effects of the disease, *see United States v. Reynolds*, 2020 WL 3266532 at \*3-4 (W.D. Wash. June 17, 2020) (denying a motion for compassionate release brought by an inmate who recovered from and was “not suffering from any reported lingering symptoms” related to COVID-19); and (v) whether the inmate’s release is expected to reduce the risk of him or her contracting COVID-19, *see United States v. Sandoval*, 2020 WL 3077152 at \*5 (W.D. Wash. June 10, 2020) (declining to release a defendant to a situation that “would likely place him at greater risk”). The Court has discretion to consider these factors,<sup>2</sup> which are not exhaustive, and they support a finding that defendant has made the requisite showing of “extraordinary and compelling reasons” for compassionate release.

---

<sup>2</sup> In the application notes to United States Sentencing Guideline (“USSG”) § 1B1.13, the Commission has described three categories of potentially “extraordinary and compelling reasons,” namely medical condition, age, and family circumstances, *see* USSG § 1B1.13 cmt. n.1(A)-(C), as well as a “catch-all” provision, *id.* cmt. n.1(D), which “opens the door” to considering factors other than those specifically enumerated, *see United States v. McPherson*, --- F. Supp. 3d. ---, 2020 WL 1862596 at \*4 (W.D. Wash. Apr. 14, 2020). USSG § 1B1.13 has not been updated since the passage of the First Step Act of 2018, and district courts nationwide are split on the question of whether the Commission’s list of “extraordinary and compelling reasons” is binding. *See United States v. Almontes*, 2020 WL 1812713 at \*3 & n.5 (D. Conn. Apr. 9, 2020); *see also Sandoval*, 2020 WL 3077152 at \*3-4. The Court concludes that, given the “catch-all” provision of the Commission’s application notes and the non-binding status of the comments to USSG § 1B1.13, it has discretion to construe the meaning of “extraordinary and compelling reasons.” *See Locke*, 2020 WL 3101016 at \*4; *Rodriguez*, 2020 WL 1627331 at \*4-6.

1 **B. Applicable Sentencing Factors and Policy Statement**

2 Both the statute at issue and the Commission's policy statement require the Court  
3 to consider the applicable sentencing factors set forth in 18 U.S.C. § 3553(a). See 18  
4 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13. The policy statement further mandates that a  
5 defendant may be granted compassionate release only if he or she is "not a danger to the  
6 safety of any other person or to the community," as evaluated in the manner outlined in  
7 18 U.S.C. § 3142(g), which governs the release or detention of an accused pending trial.  
8 See USSG § 1B1.13(2). Sections 3142(g) and 3553(a) have substantial overlap, both  
9 indicating that the Court should take into account (i) the nature and circumstances of the  
10 charged offense, (ii) the history and characteristics of the defendant, and (iii) the nature  
11 and seriousness of the danger to any person or the community that would be associated  
12 with the defendant's release. See 18 U.S.C. §§ 3142(g)(1), (3), & (4), and 3553(a)(1) &  
13 (2)(C). Section 3553(a) also directs the Court to choose sentences that promote respect  
14 for the law, impose just punishment of the offense, afford adequate deterrence, provide  
15 training, medical care, and correctional treatment in the most effective manner, and avoid  
16 sentence disparities among similarly-situated defendants. 18 U.S.C. §§ 3553(a)(2) & (6).

17 The Court concludes that a reduction in defendant's sentence is consistent with  
18 these various factors. Defendant's offense was a serious one, warranting a lengthy term  
19 of incarceration; defendant was not a passive recipient of child pornography, but rather  
20 exploited the misfortunes of others in a less-developed country and directed them to  
21 sexually assault minors between the ages of 12 and 16 for his gratification. The crime for  
22  
23

1 which defendant was convicted carries a mandatory minimum term of five years,<sup>3</sup>  
2 reflecting that, although Congress is concerned about this type of behavior, the conduct is  
3 not considered as dangerous and/or heinous as offenses associated with longer mandatory  
4 minimum sentences. Defendant, who has no other criminal history and who served in the  
5 military for eight years, is certainly not deserving of a death sentence, which is a  
6 potential outcome if he is not released, given his age and poor health and his custody at  
7 FCI Terminal Island.<sup>4</sup> To risk defendant's life under the circumstances does not promote  
8 respect for the law, impose just punishment, avoid sentencing disparities, or provide  
9 medical care and correctional treatment in the most effective manner.

10 In opposing defendant's motion for compassionate release, the Government argues  
11 that a reduction in defendant's sentence would not protect the local or global community,  
12 in light of defendant's lack of remorse or insight at sentencing, his poor attitude toward  
13 pretrial supervision, the ease with which defendant could reoffend using any electronic  
14 device, and the difficulties posed by the COVID-19 crisis in adequately supervising  
15 defendant post-release. The Court acknowledges the Government's concerns, some of  
16

---

17 <sup>3</sup> The Government does not contend that the statutory minimum term of incarceration precludes  
18 defendant's compassionate release, and the Court concludes that defendant need not complete  
19 the five-year mandatory sentence before he can obtain relief under § 3582(c)(1)(A). *See United*  
20 *States v. Somerville*, --- F. Supp. 3d ---, 2020 WL 2781585 at \*11-12 (W.D. Penn. May 29,  
21 2020); *United States v. Bess*, --- F. Supp. 3d ---, 2020 WL 1940809 at \*11 (W.D.N.Y. Apr. 22,  
2020); *Rodriguez*, 2020 WL 1627331 at \*12. *But see United States v. Varnado*, 2020 WL  
2512204 at \*1 n.1 (S.D. Cal. May 15, 2020) (observing that the Ninth Circuit has not addressed  
the issue and doubting the soundness of *Bess* and other out-of-circuit authorities).

22 <sup>4</sup> As of June 30, 2020, FCI Terminal Island had completed 967 tests for the coronavirus that  
23 causes COVID-19; 673 inmates had positive results, five tests were still pending, and ten inmates  
have died. *See* <https://www.bop.gov/coronavirus>.

1 which have been grounds for denying other motions under § 3582(c)(1)(A). *E.g., United*  
2 *States v. Robinson*, 2020 WL 3433146 at \*4-5 & n.5 (W.D. Wash. June 23, 2020); *United*  
3 *States v. Sims*, 2020 WL 2838611 at \*6 (W.D. Wash. June 1, 2020). The Court, however,  
4 is persuaded that the potentially dire consequences to defendant's health if he violates the  
5 conditions of supervised release and is returned to custody will motivate him to be  
6 compliant and cooperative.

7 Defendant must serve fifteen (15) years on supervised release. The mandatory,  
8 standard, and special conditions of supervision include *inter alia* refraining from  
9 committing another crime, registering as a sex offender, abstaining from the use of  
10 alcohol, submitting to searches and monitoring of all electronic devices, staying more  
11 than 100 feet away from areas where minors are known to frequent, avoiding any  
12 unsupervised direct or indirect contact with children, participating in a sexual deviancy  
13 treatment program, and undergoing periodic polygraph testing. *See* Judgment (docket  
14 no. 70). The Court is satisfied that these conditions of supervision substantially reduce  
15 the chances of defendant repeating the kind of behavior for which he was convicted. The  
16 Court also concludes that any public safety risk associated with defendant's early release  
17 is obviated by defendant's access to benefits through the United States Department of  
18 Veterans Affairs (the Veterans Administration), including placement at the Salvation  
19 Army's William Booth Center.

1 Nevertheless, to further alleviate fears about defendant's potential future  
2 dangerousness and to avoid disparity in sentences for similar crimes, the Court hereby  
3 imposes the following additional conditions<sup>5</sup> of supervised release:

4 1. Defendant shall have no contact, directly or indirectly, with any electronic  
5 device that communicates data via modem, nor shall defendant have any contact with any  
6 electronic device that communicates data through a dedicated connection, except when  
7 explicitly allowed by the probation officer, and with the approval of and under  
8 supervision by a supervisor as a requirement of employment. In addition, defendant shall  
9 be prohibited from having Internet access during defendant's period of supervision; and

10 2. Defendant shall participate in the location monitoring program with Active  
11 Global Positioning Satellite technology for a period of two years.<sup>6</sup> During this two-year  
12 period, defendant shall be restricted to his residence at all times except for employment,  
13 religious services, medical or legal reasons, or as otherwise approved by the location  
14 monitoring specialist. Defendant shall abide by all program requirements, and must  
15 contribute towards the costs of the services, to the extent financially able, as determined  
16 by the location monitoring specialist.

---

17  
18 <sup>5</sup> When reducing a sentence for "extraordinary and compelling reasons," the Court has authority  
19 to "impose a term of probation or supervised release with or without conditions that does not  
20 exceed the unserved portion of the original term of imprisonment." 18 U.S.C. § 3582(c)(1)(A).  
21 Because defendant must already serve fifteen (15) years on supervised release, the Court will not  
impose any further period of supervision, but consistent with § 3582(c)(1)(A), the Court is  
exercising its discretion to require defendant to comply with additional conditions of supervised  
release.

22 <sup>6</sup> This two-year period of home confinement reflects approximately the unserved portion of the  
23 five-year mandatory minimum sentence for the crime of conviction.



1 **Conclusion**

2 For the foregoing reasons, the Court ORDERS:

3 (1) Defendant's motion for compassionate release, docket no. 92, is  
4 GRANTED, and defendant's term of imprisonment is reduced to time served,

5 **provided as follows:**

6 (a) To ensure that defendant does not transmit a known pathogen to the  
7 community, within 24 hours after entry of this Order, defendant shall be tested for  
8 the coronavirus that causes COVID-19 and, if he tests negative, he shall be  
9 released within 48 hours after the results are received, but if he tests positive, he  
10 shall be placed in quarantine at FCI Terminal Island for a 14-day period and then  
11 retested; if he remains positive, he shall be quarantined for another 7-day period  
12 and retested; this quarantine protocol shall be in effect until he tests negative, at  
13 which time the 48-hour deadline for release shall apply;

14 (b) Upon release, defendant shall reside at the Salvation Army's  
15 William Booth Center until authorized by probation to reside in other approved  
16 housing;

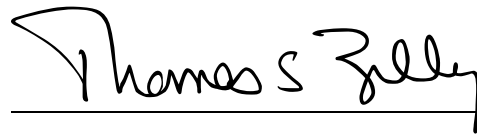
17 (c) The 15-year period of supervised release shall commence  
18 immediately upon defendant's release from custody, during which time defendant  
19 shall be subject to the mandatory, standard, and special conditions of supervision  
20 set forth in the Judgment, docket no. 70, as well as the additional conditions of  
21 supervised released outlined in this Order; and  
22  
23

1 (d) Defendant shall contact the United States Probation Office in Seattle  
2 and/or California within 24 hours of his release and follow all instructions he is  
3 given.

4 (2) The Clerk is directed to send a copy of this Order to all counsel of record.

5 IT IS SO ORDERED.

6 Dated this 8th day of July, 2020.

7  
8 

9 Thomas S. Zilly  
10 United States District Judge  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23